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UNITED STATES DISTRICT COURT  
  
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION  
  
HONORABLE CONSUELO B. MARSHALL, U.S. DISTRICT JUDGE  
  
  
  
GLOBEFILL, INCORPORATED, )  
 )  
PLAINTIFF, )  
 )  
vs. ) No. CV 10-2034-CBM  
 )  
ELEMENTS SPIRITS, INC., ET AL., )  
 )  
DEFENDANTS. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, JUNE 13, 2017

10:05 A.M.

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LOS ANGELES, CALIFORNIA; TUESDAY, JUNE 13, 2017

10:05 A.M.

- - - -

THE CLERK: Item No. 1, civil case 10-2034, Globefill, Incorporated versus Elements Spirits.

Counsel, state your appearance at the lectern, please.

MR. FAY: Your Honor, Michael Fay for the plaintiff, Globefill. I have with me Jenny Kim and Hernan Vera as well.

THE COURT: Good morning.

MR. VERA: Good morning, Your Honor.

MS. KIM: Good morning.

MR. MILLER: Good morning, Your Honor. Jon Miller for defendant Kim Brandi.

THE COURT: Good morning.

MR. RAFFERTY: Good morning, Your Honor. Tom Rafferty on behalf of Elements.

THE COURT: Good morning.

The matter before the Court today, we're treating this as a motion for an order of disgorgement of profits, attorney's fees and costs, and also plaintiff's request for a permanent injunction.

I do recall that when we were here last, there was some discussion about a trial, a bench trial, on the disgorgement of profits. But we have not treated this as a trial, so I don't

1 know what you intended, whether you were thinking that this  
2 would be a hearing where testimony would be offered and should  
3 be treated as a trial, or whether you intended it to be only a  
4 motion. So after we parted the last time, suddenly things just  
5 started being filed. So the calendar treats it as plaintiff's  
6 motion for an order for disgorgement of profits and plaintiff's  
7 request for a permanent injunction.

8 So the papers that have been filed have been read. The  
9 exhibits that were attached have been reviewed. I think I  
10 issued a minute order indicating that the parties should bring  
11 certain things with them today, because I have questions about  
12 those things, but the first -- my first concern was whether the  
13 parties expected to submit on the papers and evidence offered  
14 in support thereof in the request for disgorgement of profits  
15 and the request for permanent injunction.

16 MR. FAY: Yes, Your Honor, that's the intent of the  
17 plaintiffs, Globefill.

18 THE COURT: Okay.

19 And the defendants also expected the same, that this would  
20 be a hearing, like a hearing on a motion as opposed to  
21 presentation of evidence?

22 MR. RAFFERTY: At least Elements did, Your Honor.

23 THE COURT: Okay.

24 MR. MILLER: Yes, Your Honor.

25 THE COURT: Then I'm going to start first with the

1 permanent injunction, and I have some questions about that, and  
2 then we'll go to the disgorgement of profits.

3 So for the permanent injunction, I don't believe that the  
4 parties have actually addressed some of the factors that the  
5 Court -- on which the Court would be required to make findings.  
6 So if you think otherwise, then you can identify for me where  
7 this was addressed if it's supported by evidence and you can  
8 identify the exhibits. If you are referring to things that may  
9 have been received into evidence during the trial or arguments  
10 made during the trial, then you may identify that for the  
11 Court, too. So those factors are: The Court must find  
12 irreparable injury; the Court must also find availabilities of  
13 remedies at law are inadequate to compensate for the injury;  
14 the Court must do a balancing of the hardships; and the Court  
15 must address the public interest. Now, these are findings that  
16 the Court would typically make before the Court issued a  
17 permanent injunction, but I don't believe that the parties have  
18 addressed these in their papers, so that would be my starting  
19 place.

20 And plaintiff's counsel is standing at the lectern, so why  
21 don't I permit you to be heard first, and then I'll let the  
22 defendants address this.

23 MR. FAY: Yes, Your Honor. Thank you.

24 As to the issue of irreparable injury, Your Honor, I  
25 think the full transcript of the trial here demonstrates that.

1 The ability to prove damages from the intentional copying  
2 of the Crystal Head Vodka bottle is exceedingly difficult,  
3 and the Ninth Circuit has recognized that that's the case.  
4 Nonetheless, the testimony of Globefill's witness showed that  
5 it had a significant impact on our ability to operate as a  
6 business, that distributors and retailers were confused about  
7 the bottles. We showed through the testimony of our expert,  
8 Dr. Isaacson, that there was substantial likelihood of  
9 confusion. And yet trying to prove actual damages is  
10 difficult. How do you show, every time a bottle of KAH Tequila  
11 is sold, what is the monetary impact on a small company like  
12 Globefill? It's not easy to do, and you're not required to do  
13 it. So the only relief that Globefill can have here is the  
14 relief of telling KAH Tequila to stop, telling them to stop  
15 selling a product that they intentionally copied from our  
16 product.

17 We can't -- the standard for lost profits is reasonable  
18 certainty. In these types of situations, reasonable certainty  
19 is exceedingly difficult. And again, Globefill's not some sort  
20 of billion-dollar company. It's a small company with a single  
21 product. Trying to put together some sort of econometric model  
22 to show lost sales based on KAH Tequila, it's just not  
23 possible. But, at the same time, the jury found infringement,  
24 and it found willful infringement, and the witnesses who  
25 testified for Globefill talked about the difficulties they have

1 in the marketplace dealing with a product that is a quick  
2 follow on their product, a product which, it appears,  
3 substantially similar to their product, that people think is an  
4 extension of their product, that confuses consumers in the  
5 alcohol beverage industry.

6 The only way to give Globefill any relief for this willful  
7 infringement is to enjoin further conduct. Stop -- tell  
8 Elements, No, you're not allowed to license, assign. Whatever  
9 you're doing with this willfully infringing product, stop.  
10 Otherwise, there is no relief. Otherwise, we can't. We  
11 didn't -- as Your Honor knows, there is no damage case in  
12 this -- at trial, because it's impossible to show.

13 All right. That goes to the question of whether there  
14 would be an adequate remedy at law, what would it be. There is  
15 no adequate remedy at law here. You can't make us whole.  
16 Furthermore, the Ninth Circuit tells us in the *Playboy* decision  
17 that you're supposed to take away all the economic incentive  
18 here. You're supposed to render the situation neutral.  
19 Elements should not be able to retain any benefit of its  
20 intentional copying of our product. Well, let's say Your Honor  
21 decided to simply grant us disgorgement. They would have a  
22 huge economic incentive remaining: Just keep selling the  
23 product. So I don't get to keep my profits for the last seven  
24 years, but I get all the profits in the future. I mean, that's  
25 not an adequate remedy at law. You can't help us here by

1 simply giving us disgorgement of past profits. We need both.  
2 If you want to abide by the Ninth Circuit's directives in  
3 *Playboy*, we need both. Take away the economic benefit from the  
4 past and stop the economic benefit in the future.

5 Weighing the equities. We have a defendant that took our  
6 bottle, made a cast of it, and then made their bottle. Tweaked  
7 it a little bit. And as the one case that we cite in our  
8 papers, from New Jersey, says it would be stupid for them not  
9 to tweak it a little bit. The whole purpose of intentional  
10 copying is, Let's intentionally copy enough to fool the  
11 consumer but make enough tweaks to potentially fool the  
12 judicial system. That's exactly what they did, right? So  
13 that's on one side. On the other side is this small company,  
14 one product, that -- Your Honor heard it, all the efforts, all  
15 the efforts that Globefill employees went through to market  
16 this product, the launch here in California, the bus trips to  
17 all those cities, Dan Aykroyd signing 100,000 bottles. This  
18 is, you know, American entrepreneurship at its best. This is a  
19 company that came up with an idea, developed a product, and  
20 went out there and sold it, in good faith. And then someone  
21 comes along and intentionally copies it. The balance of the  
22 equ- -- I would submit, Your Honor, there are no equities on  
23 Elements' side. All the equities are on Globefill's side.

24 This is exactly what the Lanham Act is intended to stop,  
25 to stop this kind of conduct, this kind of unfair competition,



1 where a party comes in and says, Look, this beverage alcohol  
2 product, this skull-shaped vodka bottle, it is doing well, it's  
3 getting a lot of press, people seem to like it, let's do a  
4 quick follow, let's make one exactly like it, we'll tweak it a  
5 little, fill it with tequila, we don't have to market. There  
6 was no evidence that KAH Tequila was marketed at all. They  
7 didn't have to. We did all the work for them. They quickly  
8 follow us into the marketplace. If the Lanham Act doesn't stop  
9 this, then it's a hollow statute.

10 So there is absolutely irreparable injury here. There's  
11 no adequate remedy at law, and the balance of the equities are  
12 vastly in favor of Globefill.

13 THE COURT: Okay. Thank you.

14 Defendants wish to be heard on the factors, the four  
15 factors for which the Court must make findings to support the  
16 issuance of a permanent injunction?

17 MR. RAFFERTY: Your Honor, just briefly. Tom Rafferty  
18 on behalf of Elements.

19 I don't know whether Mr. Miller will rise for Ms. Brandi,  
20 but from Elements' perspective, this is sort of an interesting  
21 place that the plaintiff has put themselves in. This case,  
22 when it was originally filed before Your Honor, had a request  
23 for damages. Plaintiff then never took any steps to prove up  
24 any damages. Plaintiff didn't ask for a jury instruction  
25 seeking damages, and in fact, it's probably because the

1 plaintiff knew full well that they had suffered no damages,  
2 that the -- you know, if you look back at -- Mr. Fay mentioned  
3 Dr. Isaacson. Dr. Isaacson's testimony at trial was that he  
4 had done the Eveready study, the gold standard of confusion  
5 studies, and it had shown no confusion, so he went off and did  
6 some different study. So this is an odd position, because our  
7 principal objections, as Your Honor is aware, to the injunctive  
8 relief sort, had to do with the scope of the injunction and the  
9 specificity. And I can address those when Your Honor wants to  
10 hear it, but on the irreparable injury here, they didn't try to  
11 prove that they were injured, so how is their injury  
12 irreparable? They didn't bother. They could have asked for a  
13 jury instruction. They could have put on a case that said,  
14 Here are the sales that we've lost. Instead, what they relied  
15 upon was a request for equitable relief, for disgorgement of  
16 Elements' profits, not a recovery of lost profits by Globefill.

17 And that sort of ties into the availability of remedies as  
18 well. I mean, we, Elements, have submitted to the Court a form  
19 of injunction that we'd be prepared to live with pending an  
20 appeal, and that injunction would prevent any sales of tequila  
21 in KAH calavera bottles in the United States permanently, if it  
22 stayed in place, and our view -- by the way, there have been no  
23 imports of KAH Tequila into the United States since the trial,  
24 and there won't be. We're not gonna do that. Elements is  
25 committed to going through the process without creating any

1 additional damage. So the availability of remedies here, this  
2 is -- I was puzzled throughout the trial by their -- they talk  
3 sometimes about what the kind of 60,000-foot perspective was on  
4 how they'd been injured, but they made no effort to prove it  
5 up, and they made no effort to submit it to the jury, and no  
6 one prevented them doing that except themselves.

7 On the balancing of the hardships, Your Honor, just for  
8 point of personal privilege, I got involved in these cases back  
9 in November of last year, and my first involvement was to go  
10 before Judge Pregerson on a summary judgment motion in the  
11 Iconic case. So I knew very little. What I learned, I learned  
12 from reading the record of the first trial before Your Honor,  
13 reading the discovery materials in the Iconic case and in this  
14 case, and the one thing that struck me was that the -- we  
15 tried, when we came into this, to say to prior counsel, Baker  
16 and Hostetler, Do you want to have some additional open  
17 discovery? We'd like to take some more discovery. There was  
18 no willingness on their part to do that. There were a handful  
19 of other depositions that were taken after Mr. Berg and Mr. Fay  
20 came into the case. So we were basically living on a frozen  
21 record. If we had to go back and look at this again -- Mr. Fay  
22 said, Well, you know, if you copy the bottle and you make some  
23 tweaks in it -- well, that's not the *Sleekcraft* test, Your  
24 Honor. The *Sleekcraft* test says they have to be similar. They  
25 have to be likely to cause confusion. You can look at somebody

1 else's product and take it and tweak it, and if it doesn't  
2 cause confusion, it's not a violation of the Lanham Act. We're  
3 past that. But that's where we start from, and so I -- you  
4 know, in the balancing of the hardships here, I'm not sure how  
5 they declare that the balancing of the hardships are entirely  
6 in their favor. They say now they're a small company and --  
7 Elements is a teeny, tiny company, Your Honor. It has nothing  
8 at this juncture.

9 And finally, on the public interest front, Your Honor, I  
10 think the public interest issue can't be separated from the  
11 issue of the extraterritoriality of the injunction that  
12 defendant -- that the plaintiffs are proposing and that  
13 defendants object to. And I could deal with that, or I could  
14 wait until Your Honor has questions on it.

15 THE COURT: All right. No, that's fine.

16 MR. RAFFERTY: Thank you, Your Honor.

17 THE COURT: Brandi's counsel wish to place anything on  
18 the record concerning the findings that the Court must make in  
19 order to issue the injunction?

20 MR. MILLER: No, Your Honor.

21 THE COURT: Okay.

22 Plaintiffs wish to respond?

23 MR. FAY: Yes. Just very briefly, Your Honor.

24 The public interest here is written into the Lanham Act  
25 and the thousands of cases that have interpreted it. You're

1 not allowed to copy somebody's trademark and go out into the  
2 marketplace and try to make money from it. And the fact that  
3 we can't put a reasonably certain number on the damage you did  
4 is not material. The Lanham Act stands for that proposition.  
5 What about the small guy on the corner with the brand-new  
6 product, now all of a sudden someone across the street is  
7 selling it. What, he has to wait? He has to wait five years  
8 until he can actually come up with some kind of, like,  
9 reasonably certain model of his damages? No. He can go to  
10 court and stop it.

11 There was a request for damages in the beginning of this  
12 case, and counsel looked at that issue and said this -- we  
13 cannot prove this issue. We can't show in a dollar amount what  
14 it is they've done to us. But what we can show is they've hurt  
15 us. We can show that they're using our product, they're  
16 confusing people. We met the *Sleekcraft* factors. The jury  
17 found likelihood of confusion. That's it. That's all we had  
18 to show. We didn't have to tag on a dollar amount to that.

19 Jonathan Hemi, in his testimony, said -- testified this  
20 has had a significant impact on us; it's had a significant  
21 impact on our relationship with our distributors and retailers,  
22 confusion in the marketplace. Globefill had evidence about the  
23 confusion on the Internet about the product. These are the  
24 things that the Lanham Act is meant to prevent. There's your  
25 public interest. If there's no injunction here, why would

1 anyone not just go out and immediately copy a trademark?  
2 Particularly in a situation where it might be difficult to put  
3 together a damage model, it might be difficult to show lost  
4 sales. Why not just go out and do it? Once again, what did  
5 the Ninth Circuit tell us in *Playboy*? Get rid of all the  
6 economic incentive. That won't happen here unless an  
7 injunction issues. If an injunction doesn't issue here, they  
8 will have plenty of economic incentive to go forward. And then  
9 what? What does Globefill do? We have to wait until some  
10 point in the future where the damages to our product are  
11 definitive enough that it can actually be presented to the  
12 jury? That's not required by the Lanham Act.

13 Thank you, Your Honor.

14 THE COURT: My next questions will be based on the  
15 proposed injunctions that the parties provided and whether or  
16 not, if the Court in fact does issue a permanent injunction,  
17 the proposed injunction is the one that you are requesting. I  
18 raise that because I think the plaintiff, in briefing this, has  
19 taken a different position on some of these issues than what  
20 was actually in the injunction itself. So for that reason, I  
21 asked you to bring the injunctions with you, and so I have  
22 plaintiff's injunction before me now.

23 So my first question of the plaintiff's counsel would be,  
24 is this the injunction you're requesting the Court to issue, or  
25 are you requesting a modification, different language? And if

1 so, what changes should be made?

2 MR. FAY: The only language that we suggested could be  
3 changed to be in line with both the Lanham Act and with case  
4 law, Your Honor, is in Section 1b. The defendants have --  
5 defendant Elements, to be specific, have --

6 THE COURT: Excuse me. You're referring to 1b, so  
7 that's on page 2 of your proposed injunction.

8 MR. FAY: Correct. Correct, Your Honor.

9 THE COURT: All right.

10 MR. FAY: And you'll see there's a sentence -- under  
11 what's being precluded, it says manufacturing, distributing,  
12 marketing, selling, or offering for sale any goods which are  
13 packaged in a trade dress that is similar. And the defendants  
14 have objected to that word, "similar," saying it's too broad.  
15 Of course, counsel just referred to the *Sleekcraft* factors as  
16 requiring a showing that two products are similar, so, you  
17 know, but nonetheless, if it would make things a little better,  
18 what we have suggested in our papers is that could be changed  
19 to substantially similar or a colorable limitation. The phrase  
20 "colorable limitation" is actually in the Lanham Act, so I  
21 can't imagine that the defendants would have a problem with  
22 that. So that's the only place where we've suggested that  
23 maybe there could be some new language. That phrase,  
24 "colorable limitation," is actually in Section 1114(1)(a).  
25 Otherwise, this is -- this is the injunction that we would

1 propose.

2 I'm certainly willing to discuss, you know, the various  
3 issues that defendants have raised as to other parts of the  
4 injunction if you would like, Your Honor.

5 THE COURT: Not at this point, but let me ask some  
6 additional questions.

7 MR. FAY: Okay.

8 THE COURT: So I'm not sure what plaintiff's position  
9 is on whether or not defendants should be permitted a period of  
10 time to sell off its goods. So this expression, "sell off," is  
11 used in the papers by both the defendants and by the plaintiff,  
12 so the Court is assuming that plaintiff believes that that  
13 should be one of the alternatives, that defendants be given an  
14 opportunity to sell that property that has been determined to  
15 be infringing.

16 What is plaintiff's position on that?

17 MR. FAY: Yes. I mean, we have a 60-day period for  
18 them to sell off or to do whatever they need to do to be in  
19 compliance. They have suggested a nine-month period.

20 THE COURT: And not focusing so much on how much time,  
21 but what did plaintiffs envision that the defendants would do  
22 if the Court includes that language in the injunction,  
23 "sell off"?

24 MR. FAY: Yeah. Well, if you read defendants' last  
25 set of papers and if you go back to the trial, honestly, it --



1 there really isn't a sell-off concept here. The way -- in the  
2 United States. The way that the alcohol beverage industry  
3 works in the United States is, everything's sold. So the  
4 minute a bottle of KAH Tequila comes into the United States,  
5 although I do believe it's an affiliate of Elements that  
6 imports the bottle, but if it's sold to an independent  
7 distributor or if it's sold to an independent retailer, that  
8 independent distributor and that independent retailer owns that  
9 bottle. And we're not trying to enjoin those people, and they  
10 obviously have the right to sell off their product. If it's an  
11 independent, not affiliated with distributor or retailer, we're  
12 not trying to reach them. We're only trying to reach Elements  
13 and its affiliates. Therefore, honestly -- counsel just said  
14 that there's been no imports of KAH Tequila into the  
15 United States. I don't even know what kind of sell-off issue  
16 there would be, then, other than with respect to foreign sales  
17 there might be some sell-off issues. In the United States, I  
18 don't even see how there is a sell-off issue. There may be --  
19 because other countries have different ways of doing it. There  
20 may be affiliates of Elements and FINOS and SPI and Amber who  
21 have KAH Tequila on their shelves somewhere in other countries,  
22 and they should be granted like a short, short sell-off period.

23 THE COURT: So when plaintiffs make reference to  
24 "sell off," you were referring to selling the product in other  
25 countries, the product that's already in other countries, that

1 they be given an opportunity to sell that?

2 MR. FAY: Actually what we said, Your Honor, is they  
3 should be given an opportun- -- some period of time, we said 60  
4 days, to comply with the permanent injunction. And if that  
5 included some amount of selling off, so be it. I mean,  
6 honestly, I doubt there's any selling off that needs to be  
7 done. I think it really comes down to how much time should the  
8 defendants have to get into compliance with this permanent  
9 injunction. I don't see any sell-off concept here. I really  
10 don't. This isn't a situation where you have a retailer --

11 THE COURT: Why did plaintiffs even use that language?  
12 That's --

13 MR. FAY: We did --

14 THE COURT: -- why I'm asking.

15 MR. FAY: Yeah, we did use that language.

16 THE COURT: As you briefed it -- you didn't include it  
17 in your proposed injunction, but as you briefed the issues, and  
18 the Court reviews the briefs going back and forth between the  
19 parties, it does appear that the plaintiffs were also agreeing  
20 that there should be some period of time for sell-off. So the  
21 mere fact that you use that reference, what is it that you had  
22 in mind that the defendants would do during this period?

23 MR. FAY: The only thing we had in mind, Your Honor,  
24 is that they would get into compliance with the permanent  
25 injunction. That's the only thing. Honestly, we don't -- and

1 I think in our papers we said we don't even understand what  
2 they're selling off, but -- but just some period of time to get  
3 into compliance with the permanent injunction.

4 THE COURT: All right. So I'd like to hear from the  
5 defendants, then.

6 So if we look at the defendants' injunction, or proposed  
7 injunction, defendants do reference -- and I'm looking now at  
8 page 3, or really it's labeled page 2 of your injunction, and  
9 it's in Section 4, and it makes reference to a certain amount  
10 of time that you have to sell off. So maybe defense counsel  
11 could explain to the Court, what is that process? What did you  
12 have in mind doing? I'm not focusing so much on how much time  
13 you should have to do it, but what is it that you're doing?

14 MR. RAFFERTY: Well, Your Honor, it's a two-pronged  
15 problem, which Mr. Fay may have solved one of the prongs at the  
16 podium. There are -- apparently there is some KAH Tequila in  
17 the bottles that's in inventory, it's warehoused, in the  
18 United States, that predates the trial, that hasn't yet  
19 switched hands, and then there are -- there's KAH Tequila  
20 that's been sold off to distributors and retailers. Mr. Fay I  
21 think said pretty clearly that they don't anticipate that any  
22 injunction the Court might enter would reach the retailers or  
23 distributors who are currently in possession of KAH Tequila in  
24 the bottles that the jury found to be infringing. So our --  
25 that was -- so one step was, we wanted some time for those

1 people to sell off where they didn't have a threat hanging over  
2 their head that they could be hauled into court.

3 THE COURT: "Those people," you mean --

4 MR. RAFFERTY: Distributors and retailers.

5 THE COURT: And retailers. And I'm focusing more on  
6 just Elements and Brandi, the defendants in this case.

7 MR. RAFFERTY: Okay. And that's the part two,  
8 Your Honor. So whatever other inventory there is that is still  
9 under the control of Elements, we had proposed a three-month  
10 period where we could just remove that from the marketplace,  
11 take it out of the country. The tequila is still good tequila.  
12 We know we can't sell the bottles back into the United States  
13 in that form, but we might do something else with the tequila.  
14 And, you know, throughout the trial Globefill took great glee  
15 through its witnesses in saying that they had no problem if we  
16 marketed something else other than an alcoholic beverage in the  
17 calavera bottles, so there's no good reason just to destroy the  
18 bottles. So our proposal in paragraph 3 of our order was to be  
19 able to remove anything that was in Elements' possession,  
20 custody or control in the United States, from the  
21 United States, and then provide them with whatever assurance  
22 they need that that's been done. And then we had another  
23 period that dealt with the sell-off by third parties, but I  
24 think that's off the table now, so we don't have to worry about  
25 it.

1 THE COURT: So your reference to "sell off," you were  
2 referring to third parties who may have the product?

3 MR. RAFFERTY: Yes. We're perfectly happy to remove  
4 the product from the United States.

5 THE COURT: So you were not referring to the  
6 defendants in this case having some time period where they  
7 could sell the product that's in your custody.

8 MR. RAFFERTY: Well, we did have a two-step process,  
9 Your Honor, where we could sell whatever we could sell in the  
10 six months, which appears to be the kind of normal period of  
11 time, the stuff that's already here, and whatever couldn't be  
12 sold, we'd have to get out at the end.

13 THE COURT: And to whom would you be selling it?

14 MR. RAFFERTY: Well, to distributors and retailers.  
15 To distributors who then sell them further on to retailers.

16 THE COURT: In the United States.

17 MR. RAFFERTY: In the United States. But presumably,  
18 if the Court opposed that, we'd be prepared to, to the extent  
19 we're able, to remove that inventory from the United States  
20 market.

21 THE COURT: So counsel made reference to maybe there's  
22 product in storage, and so those are some questions that the  
23 Court wants to ask as well, because I don't know and  
24 understand. Do you have product in warehouses in the  
25 United States? And if so, what's the amount of product and how

1 many warehouses in various states within the United States? So  
2 this is important to the Court as we look at how much time  
3 should you have to do whatever it is you're going to be doing.  
4 So I don't really have an understanding, and I don't think that  
5 we have any testimony in this record as to product, where it  
6 is, if it's in storage, where in the United States, one  
7 location, several locations, and even the volume of product.

8 MR. RAFFERTY: Well, Your Honor, I'm now gonna be  
9 dealing in third-level hearsay.

10 THE COURT: Okay. So your answer maybe to my question  
11 is, you don't believe you've given the Court any evidence of  
12 that, and maybe you don't really have that information at this  
13 point.

14 MR. RAFFERTY: Right. My current understanding is  
15 that it's a single location and that it's a relatively  
16 substantial quantity of cases, but I also understand, from a  
17 call I had, that that could be removed from the United States  
18 if that were the alternative. I mean, we're not inclined to  
19 break the bottles and let the tequila run down the drain.

20 THE COURT: And you're correct, the Court understands  
21 that during the trial there was testimony that the plaintiffs  
22 didn't object to the bottles being used if they contained  
23 something else, not an alcoholic beverage. So one thought may  
24 be that the bottles wouldn't be destroyed, but the content of  
25 the bottles would be removed from the bottles. So maybe

1 counsel can address, what would that process be? What do you  
2 have in mind what you would do? If you're not destroying the  
3 bottles, you're just removing the content of the bottles,  
4 what's that process?

5 MR. RAFFERTY: Well, I believe, Your Honor, that  
6 process would be simply taking the bottles back, shipping them  
7 back to Mexico, to the distillery, to recover the tequila.

8 THE COURT: And are you thinking that in the warehouse  
9 that there are some bottles that are just empty bottles, they  
10 do not have tequila, or all of them would have tequila in them?

11 MR. RAFFERTY: My understanding, Your Honor, is the  
12 bottles are currently, for the last several years,  
13 manufactured, the bottles themselves, in Mexico. They were  
14 originally manufactured in China. You might remember that  
15 testimony. And so, no, I do not believe that there are any  
16 empty calavera bottles in warehouses in the United States.

17 THE COURT: So if the bottles are manufactured in  
18 Mexico, then are the bottles -- is it your understanding they  
19 are then shipped to the U.S. and then placed in -- if it's a  
20 single warehouse, placed in the -- stored in the warehouse?

21 MR. RAFFERTY: My understanding is, the bottles are  
22 manufactured in Mexico. They are turned over to Tequila de  
23 FINOS, which is the distillery. The distillery fills the  
24 bottles, packages them and ships them into the United States to  
25 a distributor ultimately, and the distributor then sells them

1 on to retailers.

2 THE COURT: So if there are bottles in the warehouse  
3 in the possession and control of the defendants -- and when I  
4 use the word "defendants," I'm talking about the defendants in  
5 this lawsuit, Elements and Brandi, that if the Court did in  
6 fact issue a permanent injunction, that you would -- these  
7 defendants would just remove the alcohol from the bottles and  
8 then ship the bottles back to Mexico? Is that --

9 MR. RAFFERTY: I think we'd have to ship the entire  
10 thing back to Mexico. We have to have someplace to put the  
11 contents.

12 THE COURT: So the process would be to take the  
13 bottles that are in storage that contain an alcoholic beverage,  
14 and they would be shipped to Mexico.

15 MR. RAFFERTY: Your Honor, to some extent, there's  
16 planning involved in this, and the thought was that they would  
17 be sent back to the distillery that originally bottled them.  
18 It would sell its tequila to a variety of people other than  
19 Elements and KAH.

20 THE COURT: And that is someplace in Mexico?

21 MR. RAFFERTY: Yes. They're all in Tequila, Your  
22 Honor.

23 THE COURT: Okay. So without knowing whether or not  
24 there's more than one storage facility in the U.S., and without  
25 knowing the content, it would be difficult for the Court to



1 know what is a reasonable amount of time for you to ship those  
2 bottles back to Mexico.

3 MR. RAFFERTY: Your Honor, I've heard this number, and  
4 I'd like to have enough leeway to write you a letter if I find  
5 out that I'm --

6 THE COURT: No, I'm probably going to ask for some  
7 evidence in the form of a declaration or something.

8 MR. RAFFERTY: Okay, that's fine, but I've heard the  
9 number 80,000 bottles, thereabouts. The trouble with the way  
10 they measure, they measure in cases, but the number of cases  
11 varies as the size of the bottle varies, and so some boxes have  
12 eight bottles, some boxes have more. So I've heard that  
13 number, but I'd like to have the Court's indulgence so that I  
14 can confirm that. And I've only heard one location.

15 THE COURT: So if we thought that was true, let's  
16 assume that one location, about 80,000 bottles, how much time  
17 are you thinking it would take to do that shipment and --

18 MR. RAFFERTY: We asked for three months, Your Honor,  
19 and I think, you know, it's a question of you have to arrange  
20 for -- you know, there's going to be some interesting dilemma  
21 with getting through the border. This was tequila from Mexico  
22 that was originally permitted into the United States. We're  
23 now going to have to get it out of here. This is not something  
24 that I think people do on a daily basis. So we put three  
25 months in our proposed form of order, from the end -- when we

1 thought they were still objecting to the sell-off by  
2 distributors and retailers, we said three months after the  
3 sell-off for those people ended we would get the rest of the  
4 stuff out of here. And so I think if we could have three  
5 months from the entry of the order to remove that material from  
6 the United States, that would be something we would aspire to  
7 achieve.

8 THE COURT: And is it the defendants' position that  
9 you may consider removing the alcoholic beverage from the  
10 bottles and keeping the bottles in your warehouse in the U.S.,  
11 or --

12 MR. RAFFERTY: No. No, Your Honor.

13 THE COURT: No.

14 MR. RAFFERTY: My understanding is that we would have  
15 to send the full bottles back to a facility like a distillery  
16 that has the capacity to do in reverse what they did going  
17 forward at the outset.

18 THE COURT: All right. Thank you.

19 Does Brandi's counsel have anything to add to that?

20 MR. MILLER: Just a little, Your Honor.

21 The evidence at trial was, and there's no dispute about  
22 this, that Kim Brandi was terminated from Elements in April of  
23 2011. I think a fundamental problem with these permanent  
24 injunctions is she's going to be enjoined from something she's  
25 not doing. So I would just simply suggest that -- and she

1 doesn't have any bottles of KAH Tequila. I have one at my  
2 house just because I've been involved with this for seven  
3 years. But for over six years she's been out of the business,  
4 not selling. There's no evidence that she was selling. So she  
5 doesn't have to be enjoined from anything.

6 THE COURT: So you're suggesting that the injunction  
7 shouldn't apply to her?

8 MR. MILLER: Correct.

9 THE COURT: She shouldn't be included?

10 MR. MILLER: Yes, Your Honor. Thank you.

11 THE COURT: All right.

12 Could I hear from the plaintiffs? So again, plaintiffs'  
13 comment on defendants' response to the Court's inquiry, that  
14 the defendants think that what they would do to comply with an  
15 injunction, if one were issued, is ship the bottles with the  
16 alcoholic beverage to Mexico.

17 MR. FAY: That is fine, Your Honor. I think there was  
18 some confusion about the six-month period.

19 THE COURT: The question of how long, the Court will  
20 decide.

21 MR. FAY: Yeah, three months is fine. We asked for 60  
22 days. Ninety days is -- we're not going to quibble over a  
23 month. And then the bottles would be shipped back to the  
24 distributor and then emptied. With that -- you know, with that  
25 understanding, is they have 90 days to get them back to Mexico,

1 empty the bottles of tequila, and then, you know, they can keep  
2 the bottles and potentially use them down the road. We asked  
3 for some sort of showing that they were going to do that, but  
4 with the representation they're not going to fill them again  
5 with any kind of alcoholic beverage, we would be fine with  
6 that.

7 THE COURT: And then Brandi's counsel has raised the  
8 question of whether it's proper to have the injunction be  
9 against Brandi as well, since she was terminated in 2011.

10 MR. FAY: Your Honor, I think absolutely so. I mean,  
11 although the --

12 THE COURT: What would be the basis for that?  
13 Normally, if we thought that activity had been discontinued,  
14 either the business was -- the entity was not in business any  
15 longer or wasn't engaged in that activity any longer, that  
16 courts often would not issue a permanent injunction. So as to  
17 Brandi, maybe counsel can explain why you think the injunctive  
18 relief should also be against her.

19 MR. FAY: Well, Your Honor, in the years since she was  
20 fired from Elements, she has tried to go to market with at  
21 least two different kinds of skull-shaped bottles, one of which  
22 did not come into the trial. Globefill made an application to  
23 bring the evidence into the trial, but last year, I believe in  
24 November of 2016, Ms. Brandi tried to trademark --

25 THE COURT: I'm going to stop counsel for a moment.

1 So if we're not having a trial on these issues, the evidence  
2 would only be that evidence that's a part of this record now.  
3 So if something did not come into evidence, then the Court has  
4 no evidence to support that request.

5 MR. FAY: It's a public record, Your Honor. You could  
6 take judicial notice of it. I mean --

7 THE COURT: I haven't been asked to do that and  
8 normally would not do that on my own.

9 MR. FAY: Okay. Well, we could resubmit it. It's  
10 been submitted to Your Honor. Your Honor excluded it from the  
11 trial, but it certainly could be reconsidered on this  
12 application. I mean, Miss Brandi was the one who created the  
13 bottle, and she has demonstrated over the last seven years a  
14 tendency to try to go back to market with similar bottles. If  
15 counsel is right and she has no intention of doing anything,  
16 why not? I mean, what's the harm of an injunction that says  
17 you can't market this, you can't market a KAH Tequila bottle or  
18 anything similar? What's the harm?

19 THE COURT: Well, the other part of the question is,  
20 why issue an injunction to preclude someone from doing  
21 something that they're not doing? But what is it that you're  
22 saying that the Court could consider, even though it was the  
23 subject of a motion in limine and the Court precluded at trial?  
24 Was it the application?

25 MR. FAY: Right. It was an application for a

1 trademark on a clear bottle, skull-shaped bottle, and the  
2 application was initially rejected by the PTO based on its  
3 similarity to the Crystal Head Vodka bottle. Your Honor, I can  
4 find out what the docket number on that was.

5 THE COURT: And if I need you to do that, I'll so  
6 order. But any further response, then, on the argument that's  
7 been made now as to the nature of the injunction, what it is  
8 that Elements would be doing if the Court issued it, and the  
9 application to Brandi?

10 MR. FAY: No, Your Honor. I think what counsel for  
11 Elements has said works for us. Ninety days, ship the bottles  
12 back to the distillery, empty them of tequila. That is -- that  
13 would work for us.

14 And I have nothing further on Ms. Brandi, other than, to  
15 our knowledge, she remains a shareholder of Elements. She may  
16 have been fired, but she still has an equity interest in  
17 Elements, and she has shown a tendency to try to go to market  
18 with bottles that are decidedly similar to Crystal Head Vodka.  
19 So we believe this injunction should issue as to her as well.

20 THE COURT: All right. Anything further from the  
21 defendants on the injunction?

22 Probably what I'm going to do is to order the parties to  
23 file with the Court another proposed injunction, and I will  
24 probably also order that you meet and confer about the language  
25 that should be in that injunction. You may be able to agree

1 once the Court makes its findings and orders a permanent  
2 injunction. You may be able to agree to the language. But to  
3 the extent you're in disagreement, you'd be permitted to  
4 comment on that. That's probably what I'll do.

5 And I think both counsel want to put something on the  
6 record on this?

7 MR. RAFFERTY: Your Honor, I guess from Elements'  
8 point of view, the most troublesome aspect --

9 THE COURT: I'll ask you to go to the lectern.

10 MR. RAFFERTY: Oh, I'm sorry, Your Honor.

11 MR. FAY: Yeah, I would just say, Your Honor, that we  
12 are prepared to address some of the other issues that Elements  
13 has raised, and I think --

14 THE COURT: About the injunction?

15 MR. FAY: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. FAY: Well, I'm just saying I think what counsel  
18 was probably trying to get to was the scope of the injunction.

19 THE COURT: Oh, and I really don't have questions on  
20 that.

21 MR. FAY: Okay. All right. Thank you, Your Honor.

22 THE COURT: Okay. So something else on this  
23 discussion about, if the Court should issue an injunction, what  
24 that process would be in complying with it. And the Court  
25 understands that what defense counsel has indicated, that you

1 would ship the bottles with the content to the company in  
2 Mexico.

3 MR. RAFFERTY: That's right, Your Honor.

4 Your Honor, I just need to make the record that the  
5 injunction that plaintiff has proposed is a worldwide  
6 injunction. We think --

7 THE COURT: It's not the injunction that the Court  
8 would issue. I will --

9 MR. RAFFERTY: Okay. Your Honor, I was --

10 THE COURT: I'll make some findings today so that you  
11 will know the scope of the injunction before you leave.

12 MR. RAFFERTY: That's fine.

13 THE COURT: And then, as I said, the Court would  
14 probably order, then, that based on the findings that the Court  
15 has made, that a new injunction be prepared and proposed to the  
16 Court, either separate or jointly.

17 MR. RAFFERTY: Then I won't try Your Honor's patience.

18 THE COURT: Okay. Anybody else want to put anything  
19 else on the record concerning the injunction now, just based on  
20 the discussion that we've had?

21 Just one more thought. So plaintiff's counsel said  
22 shipping the bottles to Mexico, that's fine, they don't object  
23 to that. Emptying the bottles that are shipped to Mexico of  
24 the tequila that now is contained in those bottles, defendants  
25 agree to that as well? That that's what you would expect to



1 occur in Mexico?

2 MR. RAFFERTY: Well, Your Honor, if Your Honor orders  
3 what we believe is the appropriate scope of injunction, which  
4 is a U.S.-only injunction, what happens to those bottles when  
5 they get to Mexico, there's a trademark in Mexico in favor of  
6 those bottles, which we believe is valid, and it's Mexican law,  
7 and so I -- you know, I don't know why we would have to agree  
8 to empty them simply because we made the mistake of sending  
9 them here. The question is, if there isn't an injunction that  
10 goes beyond the territorial United States, then those bottles  
11 are just, they're bottles of tequila that can be sold in some  
12 jurisdictions and not others. And that's typical of trademarks  
13 throughout the world, Your Honor.

14 THE COURT: All right. Plaintiffs have anything, any  
15 further comment? I raised that only because I think  
16 plaintiff's counsel included the thought that not only would  
17 the bottles be sent back to Mexico, but that they would be  
18 emptied of the liquid that they now contain.

19 MR. FAY: Well, Your Honor, obviously we think  
20 Elements should be told to stop infringing completely. I mean,  
21 they're a California company. I don't see why they can't be  
22 just told, Stop, no matter where you're going to sell these  
23 bottles. But if Your Honor decides to limit the injunction to  
24 the United States, then I guess, yes, if they're shipped back  
25 to Mexico and they're going to try to sell them somewhere else,

1 you know, we would submit that's inconsistent with the law  
2 we've cited in our brief, but so be it.

3 THE COURT: Okay. All right. So we can now go to the  
4 disgorgement of profits. And I will not be inviting any  
5 discussion on attorney's fees and costs today. So we will  
6 discuss now the plaintiff's motion for disgorgement of profits.

7 So I'm unclear as to what I'd look to first to determine  
8 the profits and also the expenses. And what's been provided to  
9 the Court, and I have Exhibit C, which was an attachment to a  
10 declaration offered by plaintiffs, and it's entitled "Elements  
11 Profit & Loss as of January 27th, 2011." It may be that  
12 Elements could answer these questions better, but it's unclear  
13 to me what period this profit and loss statement actually  
14 covers. It says as of January 27, 2011, but I don't know where  
15 the starting point is. It's also unclear, as to the expenses  
16 that are listed on the exhibit, whether these expenses are all  
17 expenses of Elements or whether Elements has some other  
18 business that's conducted, say, out of the offices, for which  
19 some of these expenses could be attributed to a different  
20 business. So just unclear to the Court as to what I'd do with  
21 the profit and loss statement as of January 27, 2011.

22 MR. RAFFERTY: Your Honor, my understanding is that  
23 this represents the sales of KAH Tequila. This was prepared,  
24 prior to any involvement that I had in this matter, by  
25 predecessor counsel, but --

1 THE COURT: Sales for what period?

2 MR. RAFFERTY: I believe it goes through 2011.

3 THE COURT: Starting when?

4 MR. RAFFERTY: At the beginning.

5 THE COURT: The beginning being when?

6 MR. RAFFERTY: Well, I don't have a date, Your Honor.  
7 The beginning being the agreement between FINOS, the supplier,  
8 and Elements. And that agreement, Your Honor, I'd have to find  
9 the citation, but it's in the record. That agreement tells you  
10 an awful lot, because, essentially, Elements doesn't have a --  
11 what you would call a complicated, robust business. Elements,  
12 when they were sued at the outset by Globefill, essentially had  
13 no capacity to either defend itself or to continue in business,  
14 so they went out and sought some outside investment. They  
15 succeeded in getting that from Mr. Cabo and FINOS, and there is  
16 an agreement between Elements and FINOS pursuant to which FINOS  
17 would provide a number of services. FINOS would produce the  
18 tequila, would bottle it, would ship it, would arrange for the  
19 sales, and would also advance whatever costs were necessary.  
20 And at the time, there were several lawsuits. It was just not  
21 the Globefill lawsuit. There was another lawsuit with a prior  
22 shareholder, Mr. Vilela. And the agreement, which I'll get you  
23 the citation for if I have a minute, the agreement provided  
24 that FINOS would advance those funds out of the sales and that  
25 ultimately FINOS would be reimbursed for those down the road,

1 so that Elements had no entitlement -- Elements had a  
2 percentage royalty rate in exchange for the transfer of its  
3 trademarks so FINOS could sell the KAH Tequila, but Elements  
4 only received revenue from FINOS to the extent that revenue  
5 exceeded the cost that FINOS had incurred both in the  
6 production, of shipping, as well as in the advancement of legal  
7 fees.

8 THE COURT: Yes, and the Court understands that there  
9 was this agreement, and the parties have provided that to the  
10 Court. So my question wasn't focused so much on that, but  
11 more on, I made reference to this exhibit that's entitled the  
12 "Profit & Loss Statement as of January 27, 2011." So counsel  
13 believes that that represents sales and expenses from the date  
14 of the agreement through January 27, 2011?

15 MR. RAFFERTY: No. That actually represents the  
16 sales. It doesn't represent all the expenses. Elements --

17 THE COURT: But it's entitled "Profit & Loss." So  
18 this document that I'm looking at, it's Exhibit C that was  
19 attached to --

20 MR. RAFFERTY: I think it was Mr. Fay's declaration,  
21 Your Honor.

22 THE COURT: No. I think the -- well, that's not the  
23 Exhibit C that I was referring to. There is another Exhibit C  
24 that's attached to Mr. Fay's declaration. It's docket number  
25 594-1. And so that document starts off with a letter and then

1 includes some calculations, I believe, that represent royalties  
2 to Elements. So I have that document, but I also have another  
3 document, and this one, Exhibit C, is actually attached to a  
4 different declaration.

5 MR. RAFFERTY: It's attached to Mr. Denning's  
6 declaration, Your Honor. I have it in front --

7 THE COURT: Yes, that's correct. So it is that one  
8 that, I assume, that Elements' position is that this document  
9 shows not only the profits but also the expenses for some  
10 period of time?

11 MR. RAFFERTY: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. RAFFERTY: And I apologize. I was answering based  
14 on Mr. Fay's Exhibit C, which happens to be Mr. Neufeld's  
15 letter with a series of -- so this -- yes, this is the -- this  
16 is, as best as we could discover, the profit and loss statement  
17 that accurately reflects the financial experience of Elements  
18 in this matter. We don't have anything else.

19 THE COURT: Okay. So the product is -- these expenses  
20 represent this product that's in issue at this trial?

21 MR. RAFFERTY: Right. And that is the only product  
22 that Elements had any connection to during this period of time.

23 THE COURT: So as we look at the expenses that are on  
24 this sheet, and they're just the typical expenses that we would  
25 expect would be incurred, these are the expenses incurred by

1 Elements for the product in issue?

2 MR. RAFFERTY: Yes, Your Honor.

3 THE COURT: And the period for the profit and loss  
4 statement, since you were looking at a different Exhibit C,  
5 what is the period that that covers?

6 MR. RAFFERTY: This is as of January 27, 2011.

7 THE COURT: Commencing the date of the royalty  
8 agreement? The licensing agreement?

9 MR. RAFFERTY: Oh, this was on an accrual basis, so  
10 this is taking forward KAH's experience, and the net income, as  
11 you can see at the bottom, is in a negative number.

12 THE COURT: Okay. Thank you.

13 So now I think plaintiffs had some comments. So I have  
14 before me the two documents that have been referenced. They're  
15 both identified as Exhibit C. The one that's docket number  
16 594-1, it shows various figures with invoices and so forth, and  
17 the other one is also Exhibit C, attached to a different  
18 declaration, entitled "Elements Spirits Profit & Loss as of  
19 January 27, 2011." So you heard defense counsel's response,  
20 and I'm prepared to hear from the plaintiff.

21 MS. KIM: Your Honor, I think Mr. Rafferty's response  
22 to Your Honor's questions on the purported profit and loss  
23 statement make it pretty clear that Your Honor should not  
24 consider this profit and loss statement in deducting any costs  
25 from Elements and/or any of Elements' affiliates' sales.

1 Mr. Rafferty just told Your Honor that this was prepared by  
2 predecessor counsel. This wasn't even prepared by anyone with  
3 personal knowledge of Elements' costs and expenses. Anybody, a  
4 CEO, maybe even Federico Cabo, perhaps, or Mr. Owens, both of  
5 whom testified at the first trial. And I note, Your Honor,  
6 that in Exhibit A to Elements' opposition, not an Exhibit A to  
7 a declaration, but Exhibit A to the brief itself, they actually  
8 go through this purported profit and loss statement, and when  
9 they go through the cost of goods, they reference a \$225,000  
10 number. They don't include that 21,000 number right underneath  
11 this, because it actually says Agava 99. What is Agava 99?  
12 Nobody knows, because no one testified to it.

13 What they could have done, is that they could have  
14 attached all of these exhibits to an affidavit from somebody at  
15 Elements who actually had personal knowledge of these  
16 documents. They did not do so. And I know that's something  
17 that came up again and again during the trial, was that there  
18 needed to be somebody who had personal knowledge of the  
19 document to lay the proper foundation for these documents so  
20 that they could be authenticated. I mean, basically what we  
21 have here is representations of predecessor counsel of what the  
22 costs and expenses were of Elements, maybe for KAH, maybe not.  
23 Not really sure. If you go through Exhibit A to Elements'  
24 brief, they don't include all of these costs and expenses as  
25 costs and expenses. I don't know why they do that or don't do

1 that. I don't know who wrote those exhibits. I don't know if  
2 it was Mr. Rafferty or his associates. I also know that, you  
3 know, Mr. Denning, who is also an associate at Cravath and  
4 Elements' counsel, is the one that attached all of these  
5 exhibits. He doesn't have personal knowledge of all of these  
6 documents. I mean, honestly, all of the other exhibits to  
7 Mr. Denning's declaration regarding these purported costs and  
8 expenses, I actually went through those. I couldn't even  
9 understand -- I couldn't really understand any of the invoices  
10 or any of the other documents themselves. All I had was  
11 Mr. Denning and whoever wrote Elements' brief word for it, and  
12 that should not be sufficient to constitute evidence. And in  
13 fact, the Ninth Circuit has held, Your Honor, that where  
14 defendants have not provided sufficient actual proof and  
15 authenticated evidence of costs of goods and expenses, they  
16 should just be disregarded by the Court, and plaintiff should  
17 be awarded the entire sales from the infringing product with  
18 respect to disgorgement. And here we assert, Your Honor, those  
19 sales that we have shown through Elements' admitted own books  
20 and records, \$13.4 million.

21 THE COURT: All right. Thank you.

22 Defendants?

23 MR. RAFFERTY: Your Honor, just briefly on -- I want  
24 to make sure that --

25 THE COURT: So plaintiff's counsel's position, as



1 you've heard it, is that even the profit and loss statement  
2 that the Court referenced, or the document from which the sales  
3 figures appear, have not been properly authenticated, and  
4 therefore, the Court can't consider them as evidence in the  
5 case. Now, if you think otherwise, then tell me where they  
6 were authenticated.

7 MR. RAFFERTY: Okay. So two things, Your Honor.  
8 First, when I refer to the document prepared by predecessor  
9 counsel, I was talking about the letter that Mr. Fay attached  
10 as Exhibit C to his declaration.

11 THE COURT: The letter dated October 7th?

12 MR. RAFFERTY: November 3rd, 2015, from Mr. Neufeld.  
13 This was Exhibit C to the Fay declaration. It's document  
14 594-1.

15 THE COURT: Well, what I'm looking at --

16 MR. RAFFERTY: You're looking at Exhibit C --

17 THE COURT: The same document, document 594-1, there  
18 is a letter, a cover letter, dated October 7, 2015. That's not  
19 what counsel's referencing?

20 MR. RAFFERTY: No. What I was referencing was --  
21 well, there are two letters. There's a letter of October 7th  
22 and a letter of November 3rd in Mr. Fay's exhibit.

23 THE COURT: And so which letter were you referencing?

24 MR. RAFFERTY: I was referring to both letters,  
25 Your Honor. Those were prepared by predecessor counsel, and --

1 the cover letter. And the October 7th letter is from  
2 tequila -- is from FINOS, and that's what attaches the various  
3 schedules. These are just business records, Your Honor.  
4 They're the books and records of FINOS.

5 THE COURT: Well, normally the Court would have some  
6 testimony to that effect, a declaration from someone  
7 representing what they are. If they were documents used at  
8 trial, then of course the Court could rely upon the trial  
9 testimony that laid the foundation for the documents, but I  
10 think in this case I don't have either.

11 MR. RAFFERTY: Well, the only person I know of who  
12 could authenticate these now is Mr. Cabo. Mr. Cabo was on  
13 plaintiff's witness list, and at the end of the trial they told  
14 us that Mr. Cabo was available, was getting ready to come, and  
15 they told us that they weren't calling him. So Mr. Cabo didn't  
16 appear at this trial. He was deposed. He was asked questions  
17 about the financial records. So we could provide an affidavit  
18 if that's what's necessary. These are the books and records.  
19 We produced them, Your Honor. You know, they're the ledgers of  
20 FINOS that show what FINOS did for Elements. I don't know how  
21 much more authentication we can do than get someone from FINOS  
22 to say here are the books and records.

23 THE COURT: No. I think it's whoever prepared these  
24 figures. Generally that's what the Court would expect to  
25 have --

1 MR. RAFFERTY: Yes.

2 THE COURT: -- from somebody that can tell the Court  
3 what they represent and so that I would know what to do with  
4 them.

5 But at this point, it appears that the Court really  
6 doesn't have any evidence, and what I'm looking at are the  
7 expenses that the defendants would ask the Court to deduct from  
8 the profits that the Court determines would be appropriate.  
9 And so the document with the expenses, I think, and I believe  
10 it's the one that you wish to have the Court consider, is the  
11 document that we referred to earlier, the profit and loss  
12 statement as of January 27th, 2011. But where is the  
13 foundation for the document that the Court could rely upon to  
14 determine what the expenses should be? That's what seems to be  
15 missing.

16 MR. RAFFERTY: Okay. Your Honor, we could provide  
17 that. You know, the way this process worked -- Your Honor, in  
18 fact, asked the question this morning, were we going to have an  
19 evidentiary hearing or were we going to have an argument on the  
20 papers? Since I lost the trial and this is sort of their  
21 motion, I was following the dance. And if I have to, I'm  
22 perfectly happy to submit a declaration from Mr. Cabo, however  
23 the Court wants to proceed, but these -- as I understand it,  
24 these are the books and records. There are no others.

25 THE COURT: All right. Anything else that you wish to

1 put on the record just concerning what is the evidence that the  
2 Court should consider for purposes of determining the expenses?

3 MR. RAFFERTY: Well, Your Honor, if we were going to  
4 go down that road, I mean, among the -- you know, I hate to  
5 sort of surface this, but I haven't been paid, okay? The  
6 expenses for -- you know, it's a painful topic to raise, but  
7 the idea that -- whether you considered these specific  
8 expenses, we were asked to provide them, we did. There's --  
9 Elements has no money. Elements has an 8% royalty rate right  
10 from FINOS, assuming that the 8% exceeds what FINOS had to  
11 outlay in defense of this matter, and it just isn't there. You  
12 know, it's the old blood from a stone. There's no profit to be  
13 had. There is only loss right now. And at this juncture,  
14 given that we can't sell the tequila in the largest market that  
15 they were selling it in, there's unlikely to be any profit in  
16 the future.

17 I think Mr. Miller wanted to --

18 THE COURT: Yes, Mr. Miller?

19 MR. MILLER: I think a lot of the difficulty,  
20 Your Honor, stems from the fact that, really, Brandi and  
21 Elements are not selling the product, so these are the sales  
22 figures of others. What's frustrating to my client in terms of  
23 the, quote, disgorgement of profit, is the fact that -- in  
24 fact, that Vilela action that's mentioned at page 9 of  
25 Elements' brief, there was a Vilela lawsuit up in Ventura

1 County, which was a derivative action, to get, you know, the  
2 shareholders of Elements to be paid something for all the  
3 sales, and there was none. And the accounting -- there was an  
4 accounting actually made in that action, and the judge said,  
5 Look, there's no judgment rule. You know, there's no -- the  
6 money doesn't get to Elements until other things are taken care  
7 of. So the uncomfortableness we all are feeling now is the  
8 fact that the people -- you know, the importer of the product  
9 isn't here in the courtroom. The distillery that profited  
10 isn't here in the courtroom. We have the entity that held the  
11 IP rights at 8%, subject to these limitations, and we have the  
12 ex-CEO of the company who's none of the above. So --

13 THE COURT: Well, I do have a few questions about this  
14 unrelated state court action. So the parties reference it in  
15 the papers, and there is some argument concerning the Trademark  
16 Assignment and Royalty Agreement and that that agreement was  
17 the subject of an unrelated state court action. It's not clear  
18 to the Court. Where was -- in what court was that action, who  
19 were the parties to that action, and did the Court in fact make  
20 some determination or finding as to the validity of this  
21 agreement? And if so, no one's given me that. So there's kind  
22 of talk about there being such. Interesting, the reference to  
23 the action, it's Cal. Super, June 26, 2014. There's no such  
24 court. Unless we're talking about California Supreme Court.  
25 But I assume we're talking about a superior court, but I don't

1 know what superior --

2 MR. RAFFERTY: We are --

3 THE COURT: -- court we're talking about, so maybe you  
4 can clear that up and --

5 MR. MILLER: Yeah, I was part of that action for a  
6 while. I wasn't at the trial, because Ms. Brandi was  
7 dismissed. But Mr. Vilela was a shareholder of Elements. He's  
8 the plaintiff, and he sued all of the above. He sued Elements,  
9 FINOS, Mr. Cabo, the importer, Worldwide Beverages, and the  
10 main distributor at the time, which was --

11 MR. RAFFERTY: Your Honor, if --

12 MR. MILLER: -- Drinks America.

13 MR. RAFFERTY: -- this might help, it's a very short  
14 opinion.

15 THE COURT: Well, it won't help me now. It would have  
16 helped me earlier, but no one gave it to me. But maybe counsel  
17 can -- the question that the Court has, there's some suggestion  
18 in the argument that the court made some determination or  
19 findings about this agreement between Elements and FINOS, and  
20 that's really my question. Did the court do that, and what did  
21 the court say about it?

22 MR. MILLER: It did. It did, Your Honor. I can read  
23 from this, from the --

24 THE COURT: Well, maybe you can just read it to  
25 yourself and tell me, and then if I need it, then I'll order

1 that it be filed.

2 MR. MILLER: Okay. I've --

3 THE COURT: So at this point I haven't considered it,  
4 because it wasn't provided to me. It's just some argument.  
5 But if counsel wishes to address the Court's concern, did the  
6 court, the -- and I guess it was a superior court. So was it  
7 Ventura or was it L.A., or what superior court?

8 MR. MILLER: It's Ventura superior court.

9 THE COURT: Okay. And did the court in fact make a  
10 finding or holding on the validity of the Trademark Assignment  
11 and Royalty?

12 MR. MILLER: Yes. It specifically identifies the  
13 royalty assignment and the fact that attorney's fees will be  
14 offset against it and finds that to be a proper exercise of the  
15 business judgment rule.

16 THE COURT: Okay.

17 MR. MILLER: Thank you, Your Honor.

18 THE COURT: Plaintiffs, I don't know whether you've  
19 seen this agreement or not or -- not the agreement, but whether  
20 you've seen this judgment or order by the court and whether you  
21 would agree that the representation made by Mr. Miller is some  
22 finding by the court that would be appropriate for this Court  
23 to consider as far as the Trademark Assignment and Royalty  
24 Agreement is concerned.

25 MS. KIM: Your Honor, we haven't seen the judgment.

1 Defendants haven't provided to us. It hasn't been filed. So  
2 I'm not exactly sure in what context the judge made that  
3 ruling, so I can't advise Your Honor as to whether or not we  
4 think it's appropriate to consider with respect to this motion  
5 or not. Based on the short portions that were quoted in the  
6 brief, I think that basically what they were trying to  
7 determine was whether or not the trademark -- entering into the  
8 Trademark Assignment and Royalty Agreement was within the  
9 business judgment rule. That is obviously not at issue here,  
10 Your Honor. What we're talking about here is whether or  
11 not it's a related party transaction. What we assert,  
12 Your Honor -- and we actually have proof of this that's in the  
13 record. Exhibit 510, which was not objected to by defendants  
14 and which was sent back to the jury, is a stock purchase  
15 agreement from June 2010 where Elements is acquired by Timothy  
16 Owens.

17 Timothy Owens, by the way, Your Honor, is Mr. Cabo's son's  
18 father-in-law, and Mr. Cabo actually financed Mr. Owens to  
19 purchase that 51% stake in Elements. So when they entered into  
20 this Trademark Assignment and Royalty Agreement in October of  
21 2010, it was an agreement between Mr. Cabo and Mr. Cabo, which  
22 is basically a related party transaction. Because of that, we  
23 think that this is a complete sham when it comes to the  
24 disgorgement of profits. They did this, Your Honor, months  
25 after we had filed this infringement action, and they did that



1 so that they could make these arguments now and say, Hey,  
2 Elements, we're broke, we hired Cravath Swaine & Moore for the  
3 second trial. Maybe Mr. Rafferty's doing this pro bono. I  
4 doubt it. I'm sure he will get paid at some point. You know,  
5 FINOS -- so after FINOS enters into this Trademark Assignment  
6 and Royalty Agreement, in 2016 they get acquired by the Amber  
7 Beverage Group, which is a subsidiary of SPI, which --

8 THE COURT: I'm going to stop counsel for a moment.  
9 So you should argue only those things that are supported by  
10 evidence in the record. So I'm sure historically both sides  
11 have a lot of information that has never been presented to this  
12 Court. It's not evidence, it's not a part of the record. So  
13 the Court can't consider any of that in deciding these issues.  
14 So I just wanted to make sure you are focusing on evidence  
15 either provided in support of the motions that are before the  
16 Court today or evidence that was provided at trial, so that we  
17 could identify that evidence.

18 MS. KIM: Well, these assertions were actually made by  
19 defendants' counsel in a motion in limine. So these are  
20 admissions by defendants. I can provide you with a docket  
21 number. It's 465. And they actually set forth the entire  
22 structure, how FINOS was acquired by Amber and how Amber is a  
23 subsidiary of the SPI Group. General counsel of the SPI Group  
24 sat through the entire second trial, and now Elements is  
25 sitting here saying, We have no money, please don't disgorge

1 anything from us, you know, we're broke. And we think that  
2 that's an absolute sham, Your Honor. We think it's a total  
3 related party transaction in order to avoid judgment. All of  
4 these actions were done after we filed this lawsuit against  
5 Elements for trademark infringement, and now that the jury has  
6 come back and found willful infringement, Elements is throwing  
7 up its hands saying, We have no money, go somewhere else. So  
8 the options that we present to Your Honor in our briefing is,  
9 you know, please enter a judgment for disgorgement of profits  
10 for \$13.4 million against Elements, and if they tell us, We  
11 don't have any money, we will take the necessary action to  
12 enforce that judgment, either bring actions against affiliates  
13 and related parties, and the plaintiffs will do that on their  
14 own, or Your Honor can also add FINOS as an additional judgment  
15 debtor.

16 THE COURT: Which I will not do. So we've discussed  
17 this previously, but the Court's not so inclined.

18 MS. KIM: Okay. That's fine, Your Honor.

19 THE COURT: All right. I do have a question  
20 concerning about data requested and when it was requested by  
21 the plaintiffs.

22 So did the plaintiffs request profit data or documents for  
23 2016, and when was that request made? Was it during discovery  
24 pretrial? Or was it a request made either subsequent to the  
25 trial in support of these motions?

1 MS. KIM: It was a request that was made pretrial,  
2 Your Honor, to the best of my knowledge. I believe it was  
3 after we were hired as new counsel for the second trial. We  
4 requested additional profit and loss data for 2016, and we  
5 received none.

6 THE COURT: Okay. But you didn't file a motion to  
7 compel.

8 MS. KIM: At that time, Your Honor, I mean, we were  
9 doing pretrial prep, so I think that we thought that we would  
10 be able to function that way. However, defendants have made  
11 the representation that Elements made no profits in 2016,  
12 although, again, I would like to see exactly what they mean,  
13 because if FINOS made profits from the sales of KAH Tequila, we  
14 do think that that is basically -- that should be considered as  
15 part of the profits made from the sale of KAH Tequila as a  
16 related party.

17 THE COURT: Okay. So this next question is really for  
18 the defendant, so this has been discussed here.

19 What is Elements' explanation for its contention that it  
20 had no profits in 2016? What should the Court rely upon to  
21 make such a finding, to the extent that that's necessary? And  
22 so I'm looking at evidence, not just argument. So hopefully  
23 counsel will --

24 MR. RAFFERTY: No, no. Sometimes, Your Honor, the  
25 interesting conundrum one is faced with when proving a

1 negative. There were no sales, so, you know, a set of books  
2 and records that shows revenue, they're just not there.

3 THE COURT: Well, the question is, you say there were  
4 no sales. What is the evidence that the Court could rely upon  
5 or cite to that there were no sales? What are you relying on?

6 MR. RAFFERTY: We have no evidence of any sales. If  
7 we need a declaration to that effect -- we went back. They  
8 asked us for 2016. We went back and asked the client, Give us  
9 what documents you have for 2016. And the answer came back, We  
10 have none. We're not -- we're essentially in standdown holding  
11 mode until we get an answer from the Court as to whether we can  
12 continue to do this, selling tequila into the United States.

13 THE COURT: All right. My next questions are just  
14 based upon how the Court could calculate profits as to Brandi.

15 Did plaintiff's counsel wish to respond to defense  
16 counsel's statement? I think the statement is, We have no  
17 evidence, but --

18 MS. KIM: No, Your Honor.

19 THE COURT: -- none has been provided to the Court.

20 MS. KIM: We're fine with that.

21 THE COURT: Okay. Brandi's profits. What are -- and  
22 this is a question for the plaintiffs. What is your position  
23 as to what Brandi's profits are from the sale of the KAH  
24 Tequila in the United States from 2010 to the time that she  
25 separated from the company in April of 2011?

1 MS. KIM: Your Honor, we haven't been provided with  
2 any of that information. We do know that Miss Brandi and  
3 Elements entered into a settlement, I believe of the Iconic  
4 litigation, and I do believe that also concerned the Trademark  
5 Assignment and Royalty Agreement. And we would submit to  
6 Your Honor that whatever Miss Brandi received as a settlement  
7 of that, because it was definitely something that was related  
8 to the sale of KAH Tequila, would be something that we would  
9 seek recovery of. But of course we don't know that  
10 information. We actually asked defendants for it several  
11 times, and I believe that we made a motion in limine seeking  
12 defendants to -- seeking this information from defendants, and  
13 I believe that motion in limine was decided against us.

14 THE COURT: So would you agree that the Court at this  
15 point has no evidence, no document, nothing that the Court  
16 could reference, to make any findings in support of Brandi's  
17 profits from 2010 to the time that she separated from the  
18 company, 2011?

19 MS. KIM: Your Honor, Miss Brandi didn't separate from  
20 the company. She was terminated as CEO of the company, but she  
21 maintained --

22 THE COURT: Well, that's what I'm referencing as  
23 separated from the company. So you would say she didn't  
24 separate, but she was terminated.

25 MS. KIM: Well, no. I would say that she's still a

1 49% owner, Your Honor. She's still a 49% owner of Elements.  
2 So whatever Elements and/or FINOS made from the sale of KAH  
3 Tequila, she should held liable for that amount as well.

4 THE COURT: And I have evidence to support such a  
5 finding?

6 MS. KIM: Yeah. That's Exhibit 510, Your Honor, which  
7 is a stock purchase agreement, and that shows a 51% ownership  
8 being sold to Timothy Owens, and the 49% remains with  
9 Ms. Brandi. Also, Mr. Cabo testified to that several times  
10 during the first trial.

11 THE COURT: And so I believe your answer to this  
12 question is "yes." The question is, did Brandi have profits  
13 after 2011? Your position is she did. The exhibit that would  
14 support that would be Exhibit 510?

15 MS. KIM: Yes. And I mean, if Your Honor wants, I can  
16 also provide you trial testimony cites for the first trial,  
17 where Mr. Cabo actually testified that Miss Brandi still  
18 retained a 49% interest, and that was in 2013.

19 THE COURT: Okay. One other question just concerning  
20 Ms. Brandi. The question is this: Did Brandi receive any  
21 portion of the gross sales of KAH Tequila in the United States  
22 or a portion of the 8% royalties earned by Elements -- that's  
23 Elements' position -- under the agreement with FINOS? And  
24 again, what is the evidence to support that one way or the  
25 other?

1           So, Mr. Miller, do you want to take a stab at that first?  
2       The question is, did Brandi receive any -- and so, better  
3       stated, is there any evidence to support a finding by the Court  
4       that Brandi received any portion of the gross sales or the 8%  
5       royalties earned by Elements pursuant to the agreement with  
6       FINOS?

7           MR. MILLER: None whatsoever, Your Honor.

8           THE COURT: And then since that is Brandi's counsel's  
9       position, what is the plaintiff's position? And again I'm  
10      looking for evidence. So what I've found in these papers is,  
11      lot of papers, lots of arguments, but very little reference to  
12      the supporting evidence. So I'll let counsel respond to that  
13      question.

14          MS. KIM: Your Honor, we haven't seen any evidence  
15      from defendants regarding that point. However, I think we  
16      would submit that Ms. Brandi profited just as Elements  
17      profited. And under Section 1117(a), all plaintiffs are  
18      obligated to do is to show sales for the infringing product,  
19      and it is up to defendants to show that the defendants didn't  
20      profit from them or to claim costs and deductions. And as  
21      Mr. Miller just said, they have no evidence with respect to  
22      that. Accordingly, we should be entitled to all of the sales  
23      in a calculation for disgorgement.

24          THE COURT: All right. Anything else? Those are all  
25      the questions. I have some findings that I'll place on the

1 record, but anything else that either side wishes to place on  
2 the record concerning the requests for permanent injunction or  
3 the motion for disgorgement of profits?

4 Plaintiffs can address that first, and then I'll let -- if  
5 you have anything else. And maybe you don't. Maybe you feel  
6 that it's been adequately discussed here.

7 MR. FAY: Yes, Your Honor. The only thing we would  
8 add is that we feel that under the Ninth Circuit's decision in  
9 *Trader Joe* and the *Timberlane* factors, that an injunction as to  
10 Elements here in California should tell them to stop  
11 infringing, with no limitations on scope.

12 THE COURT: Okay.  
13 Counsel?

14 MS. KIM: Your Honor, as to that point, I know that  
15 Mr. Miller said that Elements is just an IP company that holds  
16 a license to this trademark. If that's so, Your Honor, that  
17 profit and loss statement that was attached as Exhibit C to the  
18 Denning declaration, if we turn to that, Your Honor, and that  
19 again --

20 THE COURT: I have it before me.

21 MS. KIM: Yeah. Mr. Rafferty says is the books and  
22 records of Elements. I'm wondering why an IP company -- and  
23 this goes through January 27, 2011. That purported Trademark  
24 and Assignment Agreement was November -- was October of 2010.  
25 I'm wondering why, if they're just a licensing company, why



1 there are all these expenses for selling and marketing.

2 THE COURT: Okay.

3 All right. Defendants wish to place anything else on the  
4 record? You can respond to counsel. She wonders why. But you  
5 can also address anything that you have not already addressed  
6 in opposition to the motions.

7 MR. RAFFERTY: Your Honor, unless you have any further  
8 questions of me, I would just say that the Vilela decision is  
9 at 214 Westlaw 8114366. It's published there. I don't think  
10 it's published anywhere else. Thank you.

11 THE COURT: Could you give me the cite again, please?

12 MR. RAFFERTY: Sure. I can hand it to you. I can  
13 hand my copy to your clerks, if they can --

14 THE COURT: Well, defendants indicate that they don't  
15 have it, either, so I think it would have to be provided to the  
16 court in a way that defendants would also have a copy.

17 And my law clerk is telling me we don't have access to  
18 that cite. So it would have to be provided to the Court in a  
19 form of an exhibit.

20 So I can ask defendants -- I mean the plaintiffs here,  
21 counsel says he has it, he'd like to give it to us now. Any  
22 objection?

23 MR. FAY: No objection, Your Honor.

24 THE COURT: Okay.

25 MR. RAFFERTY: I have one that I highlighted,

1 Your Honor, and --

2 THE COURT: So if you can give me a clean copy, you  
3 can leave it with the clerk, and you should provide a copy to  
4 the plaintiff as well.

5 MR. RAFFERTY: Can I send a letter this evening with  
6 copies for the --

7 THE COURT: That is probably a faster way to do it,  
8 but --

9 MR. RAFFERTY: Okay. I will copy Mr. Fay and  
10 Miss Kim.

11 THE COURT: Okay.

12 MR. FAY: Thank you, Your Honor.

13 THE COURT: All right. So I'm assuming that there's  
14 no additional argument that either side wishes to place on the  
15 record for either the request for a permanent injunction or  
16 disgorgement of profits, and so the Court will make some --  
17 these are tentative findings. The difficulty that I had with  
18 the motions that were before the Court and the arguments of  
19 defendants is a lack of evidence. So these are just  
20 tentatives. The Court will go back to try to find some of  
21 these things that you've referenced today to see if this helps  
22 and if it would support the tentatives.

23 So I start first with, assuming that the Court is going to  
24 issue a permanent injunction, the scope of the injunction will  
25 be limited to the United States. The permanent injunction is

1 also limited to the skull-shaped calavera trade dress for KAH  
2 Tequila. And so there's been some suggestions here as to what  
3 the language should be. Plaintiffs use "similar." Plaintiff's  
4 counsel today suggested we could track the language that's used  
5 in the statute. The concern that the Court has about this is,  
6 if there are other proceedings, post proceedings -- contempt is  
7 what we typically see -- or some other proceeding about a  
8 violation, will these words be meaningful in a way that we will  
9 know what to litigate? So, "similar," clearly just too broad,  
10 too vague, but counsel suggests look at the statute itself and  
11 try to use that language. So that's what the Court would do; I  
12 would use the language in the statute.

13 Next, the permanent injunction will be limited to the  
14 defendants in this lawsuit, their officers, agents, servants,  
15 employees, attorneys, and persons in active concert or  
16 participation with them as set forth in Federal Rule of Civil  
17 Procedure 65(d). It would not include other parties such as  
18 FINOS, as the plaintiffs have requested.

19 And the Court, based upon the statements that you've made  
20 here today, the Court would make a determination as to what  
21 period of time is necessary for the defendants to comply with  
22 the Court's order.

23 I will also require that the defendants certify to the  
24 Court, once the injunction is issued, and that'll be a part of  
25 the injunction, that you have done whatever the injunction

1 requires you to do.

2 As to the disgorgement of profits, the tentative that the  
3 Court would make at this point, if the Court were granting that  
4 motion, I would make a finding that the Court lacks  
5 jurisdiction to order disgorgement of profits for the  
6 nonparties, and that would be FINOS. Based on the evidence  
7 that the Court has been given so far, the Court would find that  
8 the gross sales of KAH Tequila would be \$871,536.86 for  
9 Elements from 2010 to 2015. Now, that is taking the -- looking  
10 at the royalty agreement, the 8%, and then also deducting those  
11 expenses that are contained in the exhibits that we've  
12 referenced here. But if the Court has no evidence supporting  
13 the foundation for any of those exhibits, then the Court would  
14 have no evidence as to the expenses and therefore could not  
15 make any deduction therefor.

16 I believe there is sufficient evidence to support the  
17 agreement, the royalty agreement; however, I have not looked at  
18 this decision by the state court, and so I'm not sure what the  
19 Court will do with that decision in terms of this whole issue  
20 of the royalty agreement.

21 The Court makes no findings at this point on attorney's  
22 fees and costs, but will include that in its order.

23 So what the Court will order tentatively from the bench,  
24 but I will put this in a written order, if I feel that I need  
25 something more from the parties, then I will order that that be

1 provided or that citations be provided to anything that you  
2 rely upon that was evidenced at trial or was included in any  
3 previous order, such as motions in limine that might have been  
4 issued by this Court.

5 The Court will likely order that the parties meet and  
6 confer if the Court issues an injunction and attempt to provide  
7 the Court with one injunction that would satisfy both sides,  
8 but if unable to do so, then you each would provide a proposed  
9 injunction. And the reason I would include that is, it's clear  
10 that the original proposed injunction from the plaintiffs is  
11 certainly not the injunction that the plaintiffs are asking the  
12 Court to issue now. Some changes would have to be made. The  
13 proposed injunction that the defendants provided the Court,  
14 some adjustments would have to be made to that as well. So I  
15 think the Court needs a different injunction to work from for  
16 purposes of actually issuing one.

17 That's all I have at this point. I've just given some  
18 tentative findings, tentative rulings, but the matter is deemed  
19 submitted. The Court may ask you to provide more evidence, and  
20 if I wish to have more, I'll provide that in the form of an  
21 order to you, being very specific as to what I need so that you  
22 don't give me too much information, information that I don't  
23 need. And if I request additional information, then of course  
24 I will not rule on either of the motions that are pending until  
25 I receive that additional information. And it's helpful --

1 would be helpful to the Court that you not argue these  
2 positions. I mean, you've argued them in the papers that you  
3 filed. You've argued them again here. Some of them were  
4 argued at trial. But I'm looking now for just evidence that  
5 supports what you wish to have the Court do.

6 We're in recess now. Thank you.

7 MR. FAY: Thank you, Your Honor.

8 THE CLERK: Please rise.

9 This court is in recess. This court is adjourned.

10

11 *(Proceedings concluded at 11:39 a.m.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753,  
Title 28, United States Code, the foregoing is a true and  
correct transcript of the stenographically reported proceedings  
held in the above-entitled matter and that the transcript page  
format is in conformance with the regulations of the  
Judicial Conference of the United States.

Date: June 14, 2017

/S/ SANDRA MACNEIL

Sandra MacNeil, CSR No. 9013